APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 16, 1982

No. 81-2951

UNITED STATES OF AMERICA

v.

LEVIN, HARVEY M.,

Appellant

(D. C. Crim. No. 81-00203)

Present: GIBBONS, SLOVITER and BECKER, *Circuit Judges.*

1. Appellee's motion to dismiss appeal for the reason that the order appealed from is not a "final decision" within the meaning of 18 USC § 1291,
2. Copy of Brief of Appellee sent by the undersigned for the Court's information,

in the above-entitled case.

Respectfully,

/s/ SALLY MAVOS
Clerk

enc.
FM:dt

The foregoing Motion is/are granted

By THE COURT,

/s/ JOHN J. GIBBONS
Judge

Dated: April 8, 1982

Certified as a true copy and issued in lieu of a formal mandate on May 13, 1982.

Teste /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2951

UNITED STATES OF AMERICA

v.

HARVEY M. LEVIN,

Appellant

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS
Judge

Dated: May 5, 1982

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-203-1

UNITED STATES OF AMERICA

v.

HARVEY M. LEVIN

Memorandum and Order

(FILED NOV 13 1981)

FULLAM, J. NOVEMBER 12, 1981

The defendant, a medical doctor, was engaged in conducting certain preliminary field tests to determine the efficacy of certain drugs for the relief of pain. The results were reported to the Food and Drug Administration, and per-patient bills were rendered by the defendant to the drug manufacturers. The Government alleges that, in hundreds of instances, neither the drug nor a placebo was administered at all, and that the billings were fraudulent and the test results fictitious. The defendant has been indicted on various counts of mail fraud and submitting false statements to a government agency.

The defendant sought leave to enter a plea of *nolo contendere*. Among the principal arguments asserted by defense counsel in support of the tendered plea were: (1) after reviewing the matter thoroughly with his counsel, the

defendant is convinced that conviction is extremely likely, even inevitable, (2) a trial would prolong and exacerbate the unfavorable publicity, with unfair adverse consequences to the hospital where the tests were being conducted; and (3) a trial would cause undue embarrassment to the defendant's patients. In opposing the plea, the Government expressed its concern that civil proceedings for the possible suspension or revocation of the defendant's license to practice medicine would be adversely affected by a plea of *nolo contendere*, as compared with a plea of guilty or a verdict of guilt. Initially, I recessed the hearing for a few days to enable the parties to explore this aspect of the matter.

At the conclusion of the adjourned hearing, the Court still did not have a firm basis for assessing the differential impact upon the defendant's license to practice medicine. The Pennsylvania Medical Practice Act authorizes the State Board of Medical Education and Licensure

> "(a) . . . to refuse, revoke or suspend the license of a physician for any or all of the following reasons: . . .
>
> "(3) being convicted of a felony in the courts of this Commonwealth or any other state, territory or country. Conviction as used in this paragraph shall include a finding or verdict of guilt, an admission of guilt or a plea of *nolo contendere*." (63 Purdon's Pa. Stat. Ann. § 421.15(a)(3))

Based upon informal inquiries, the Government asserts that, whereas a plea of *nolo contendere* would provide a basis for disciplinary action, it would not be as conclusive with respect to the underlying facts of the offense, as would a plea of guilty or a verdict of guilt. According to the Government, the defendant would still be free to dispute his guilt before the licensing authorities. The defendant argues, on the other hand, that the same

would be true in the event of a plea of guilty, namely, that the defendant would be free to dispute the facts in an effort to mitigate the penalty.

At the conclusion of the hearings, I expressed the view that the Government's arguments related to the civil licensing proceedings would not justify rejection of the tendered plea. But I nevertheless rejected the plea, because it appeared that the fundamental contention of the defendant is that he is innocent of the charges, a victim of misconduct or negligence on the part of subordinates. It is one thing to accept a plea of guilty or of *nolo contendere* without an express admission of guilt; it is quite another to accept a plea from a defendant who affirmatively protests his innocence.

I recognize that an Alford-type plea is acceptable in some circumstances, but I do not believe it would be appropriate in this case. The potential for undermining confidence in the administration of justice in our courts is too great. Acceptance of a plea of guilty from a defendant who insists that the true blame lies elsewhere would put the Court in a position of seeming to condone a miscarriage of justice. Acceptance of a plea of *nolo contendere* would merely make that suggestion more plausible.

Accordingly, as stated in open court at the conclusion of the hearings, I have concluded that neither the tendered plea of *nolo contendere*, nor a plea of guilty, should be entertained.